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No. 94-936

In the Supreme Court of the United States

OCTOBER TERM, 1994

MONTANA SULPHUR & CHEMICAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Secretary of Labor received a complaint from one of petitioner's employees under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, alleging that petitioner did not x-ray its welds or certify its welders. The question presented is whether the court of appeals correctly upheld the enforcement of an administrative subpoena that sought documents relating to the safety of petitioner's welding practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 32 F.3d 440. The opinion of the district court (Pet. App. 22a-24a) and the recommendation of the magistrate judge (Pet. App. 25a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1994. The petition for a writ of certiorari was filed on November 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, aims to assure safe and healthful working conditions for the nation's workforce. Section 5(a)(1), the Act's "general duty clause," requires every employer to provide its workers with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). In addition, the Act directs the Secretary of Labor[1] to promulgate occupational health and safety standards applicable to all employers. 29 U.S.C. 655. To further carry out the purposes of the Act, the Secretary is authorized to "inspect and investigate * * * any * * * place of employment." 29 U.S.C. 657(a)(2). Employees or their representatives may request an inspection if they "believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists"; if the Secretary determines that there are "reasonable grounds to believe that such violation or danger exists," he must investigate. 29 U.S.C. 657 (f)(1). In the course of his inspections and investigations, the Secretary may, pursuant to Section 8(b) of the Act, "require * * * the production of evidence under oath." 29 U.S.C. 657(b). District courts have jurisdiction to compel compliance with subpoenas issued under Section 8(b), and may punish the failure to obey such orders as contempt. *Ibid.*

2. Petitioner is a chemical manufacturer that deals with hazardous materials such as hydrogen sulfide. Pet.

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[1] The Secretary of Labor has delegated his responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who administers the Act through the Occupational Safety and Health Administration (OSHA).

App. 2a. It stores those materials in containment vessels connected to each other by pipes that are welded to the vessels. *Id.* at 3a n.1. One of petitioner's employees submitted a written complaint to OSHA alleging, *inter alia*, that petitioner "did not x-ray its welds or certify its welders." *Id.* at 2a. After reviewing the complaint, the OSHA area director determined that an inspection was warranted under Section 8(f), because improper welding can rupture and thereby cause lethally toxic chemicals to escape. Pet. App. 2a-3a. During their consensual inspection of petitioner's plant, OSHA inspectors learned that a private company certified petitioner's welders, and that petitioner used water pressure tests, rather than x-rays, to verify the adequacy of its welds. *Id.* at 3a.

After the inspection, OSHA requested six categories of documents that related to petitioner's welding procedures. Pet. App. 3a. Petitioner refused to comply with the request unless OSHA provided it with certain additional information, including a copy of the original complaint. *Ibid.* Neither OSHA's response nor subsequent negotiations, however, resulted in petitioner's compliance. *Id.* at 4a.[2]

OSHA then consulted with its welding expert and issued an administrative subpoena for 17 categories of documents, Pet. App. 4a & n.3, all of which related to petitioner's "welding practices and the danger of toxic gas leaks." *Id.* at 16a. When petitioner refused to comply with the subpoena, OSHA sought judicial enforcement. *Id.* at 5a. After conducting an evidentiary hearing, a magistrate judge concluded that the Act's general duty

[2] Contrary to petitioner's assertions (Pet. 4, 13-14), the exact nature of OSHA's response was a disputed fact not resolved below. Pet. App. 4a n.2.

clause, 29 U.S.C. 654(a)(1), provided OSHA with the authority to request the documents, and that, although production might be burdensome for petitioner, OSHA needed the requested information "for a thorough and complete investigation into what is potentially a very hazardous workplace." Pet. App. 27a-28a. Accordingly, the magistrate recommended enforcement of the subpoena. *Id.* at 29a.[3] The district court adopted the magistrate's recommendation and issued an order compelling petitioner to produce the documents under subpoena. *Id.* at 24a.

3. The court of appeals affirmed. Pet. App. 1a-21a. It concluded that OSHA's request satisfied the "well-established" test for enforcement of administrative subpoenas because "(1) * * * Congress has granted the authority to investigate; (2) * * * procedural requirements have been followed; and (3) * * * the evidence is relevant and material to the investigation." *Id.* at 7a. In addition, the court concluded that the subpoena did not violate the statutory command that the Secretary impose only a "minimum burden" on employers when obtaining information, 29 U.S.C. 657(d), and met the Fourth Amendment's requirement of "reasonableness" because it was neither "overbroad [n]or unduly burdensome." Pet. App. 18a.

The court reasoned that OSHA had the authority to issue the subpoena in this case because under Section

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[3] After holding an evidentiary hearing, the magistrate judge rejected petitioner's claim that OSHA had issued the subpoena as a means of harassing the company, finding "[t]here is simply no evidence which suggests any improper motive." Pet. App. 28a. That finding was adopted by the district court, *id.* at 23a, and upheld by the court of appeals, *id.* at 20a. Despite stray rhetoric to the contrary (Pet. 11 n.3, 15), petitioner has not sought further review of the issue.

8(f), the agency may investigate employee complaints that allege violations of the general duty clause. Pet. App. 10a. Moreover, administrative subpoenas do not require "that a specific charge or complaint of violation of law be pending." *Id.* at 9a, quoting *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946). Thus, the absence of OSH Act regulations governing welding, which petitioner had relied upon in claiming that OSHA lacked authority to investigate, had "no special significance." Pet. App. 10a.

The court also concluded that the Act did not require OSHA to limit its investigation to the precise matters alleged in the complaint filed by one of petitioner's employees. Pet. App. 11a-14a. Instead, the court reasoned, the agency may request documents that "f[a]ll within its broader statutory enforcement obligations," because Section 8(f) authorizes OSHA to investigate the " 'violation *or danger*' stated by a complaint." Pet. App. 12a. The court emphasized that the agency in this case, confronted with a complaint about potentially dangerous welding, had not conducted a wall-to-wall search of petitioner's facility, but had simply "attempted to determine the adequacy of [petitioner's] welding procedures" through inspection of documents. *Id.* at 13a. Thus, OSHA's subpoena "was addressed to precisely th[e] danger" raised by the complaint, namely, the "catastrophic release of hazardous chemicals due to improper welding." *Id.* at 12a. The court cautioned that petitioner's construction of the Act, under which OSHA becomes "a prisoner of the precise terms of the complaint," *id.* at 11a n.7, would prevent the agency from fulfilling its mission of assuring workplace safety. *Id.* at 13a.

The court also held that the document request "easily satisfie[d]" the test for relevance. Pet. App. 16a. It

stated that "when seeking to enforce a § 8(b) subpoena, OSHA must show only that the documents it requests are relevant to the purpose of an authorized investigation." *Id.* at 15a. Reviewing all 17 categories of requested documents, the court concluded that the subpoenaed material related to various aspects of petitioner's "welding practices and the danger of toxic gas leaks," and observed that each category was "relevant to a thorough investigation of the safety of [petitioner's] chemical containment." *Id.* at 16a-17a.

The court of appeals found no basis in the structure of the OSH Act for the "slightly narrower" (Pet. App. 15a) test of relevance urged by petitioner, under which OSHA could inspect only those documents bearing "clear relevance to the conditions about which complaints have been received." Pet. App. 14a, quoting *Donovan* v. *Fall River Foundry Co.*, 712 F.2d 1103, 1111 (7th Cir. 1983). While the court would not approve OSHA "rummaging through the entire files of a company," it concluded that the requirements of "reasonableness" and "minimum burden" imposed by the Fourth Amendment and the OSH Act "adequately bar enforcement of overbroad 'fishing trip' subpoenas." Pet. App. 16a. Thus, the court rejected petitioner's contention that the subpoena must be limited to documents that related only to the specific problems alleged in the complaint. *Id.* at 14a.

The court similarly concluded that the subpoena was not unreasonable under the Fourth Amendment. Pet. App. 17a. It agreed with the magistrate judge's determination that although OSHA's request "imposed a burden" on petitioner, *id.* at 18a, it was "reasonable," in light of the risk of toxic leaks posed by inadequate welding, for the agency to determine not only whether petitioner x-rayed its welds, but "to inquire further into the types of tests done, the general schematics of

[petitioner's] containment system, and [petitioner's] awareness of any past problems." *Id.* at 19a. The court also "note[d] with approval" that OSHA's description of the documents requested was "highly specific." *Ibid.* And because OSHA had "carefully tailor[ed] its document requests as to time, place, and subject matter," the agency had satisfied its obligation under Section 8(d) of the Act to obtain information with a "minimum burden upon" petitioner. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is unwarranted.

1. Petitioner argues (Pet. 11-14) that the court of appeals erred in its determination that the subpoenaed documents were "relevant" for purposes of the Fourth Amendment. With regard to administrative subpoenas of corporate documents, the Court has consistently found the Fourth Amendment is satisfied "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).[5] The administrative subpoena in this case

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[4] We are informed that OSHA has not yet returned petitioner's records. Therefore the case is not presently moot. See *Church of Scientology* v. *United States*, 113 S. Ct. 447, 450 (1992).

[5] See, *e.g.*, *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome"); *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 209 (1946); see also *In re McVane*, No. 94-6118, 1995 WL 15828, at *6 (2d Cir. Jan. 12, 1995) ("The *Morton Salt* standard, with minor linguistic variations, has become the

fully satisfies these "minimal limitations on administrative action" and thus meets the Fourth Amendment's "reasonableness" requirement. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967).

First, the subpoena in this case falls squarely within OSHA's authority to enforce the Act's general duty clause. That clause requires every employer to provide a workplace "free from recognized hazards," 29 U.S.C. 654(a)(1), and this broad obligation governs employer conduct in the absence of more specific standards. See *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980); *Donovan* v. *Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981). Section 8(f), in turn, authorizes OSHA to investigate suspected "violation[s]" and "danger[s]" identified in employee complaints. 29 U.S.C. 657(f). Nothing in the Act suggests that OSHA may conduct an employee-triggered inspection under Section 8(f)(1) to determine compliance with a particular standard, but not to determine compliance with the Act's most comprehensive obligation. See *Reich* v. *Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1167 (7th Cir. 1994); *Dole* v. *Trinity Indus., Inc.*, 904 F.2d 867, 872-873 (3d Cir.), cert. denied, 498 U.S. 998 (1990). The court below, therefore, correctly rejected petitioner's contention that OSHA lacked inspection authority in the absence of specific standards that govern welding.

Nor is it open to question that OSHA was authorized to subpoena information supplementary to the two discrete welding problems mentioned in the complaint. Specific allegations of inadequate welding reasonably led OSHA to investigate the attendant danger of toxic chemical leaks at the plant. The agency's inquiry into

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accepted test for judicial enforcement of administrative subpoenas.").

the overall adequacy of petitioner's chemical containment system thus confined itself to "the precise * * * danger" raised by the complaint, Pet. App. 12a, and was well within OSHA's investigatory responsibilities. See, *e.g.*, *Reich* v. *National Eng'g & Contracting Co.*, 13 F.3d 93, 99-100 (4th Cir. 1993) (complaint about inadequate protection against falls at one site justified investigation into safety procedures at other sites, including subpoena of injury logs for those other sites); *Trinity Indus.*, 904 F.2d at 873 (OSHA properly subpoenaed employer logs related to overall lost work day injuries in response to employee complaint concerning lack of hard hats and safety glasses).[6] In sum, OSHA did nothing more in this case than "take steps to inform itself," *Morton Salt*, 338 U.S. at 643, as to whether petitioner was fulfilling its obligation under Section 5(a)(1) to avoid lethal leaks.

Second, the court of appeals' conclusion (Pet. App. 18a-19a) that the subpoena provided a sufficient description of the documents so as to avoid an undue burden on petitioner, see *Morton Salt*, 338 U.S. at 652-653, is also unassailable. The test of adequacy "vari[es] in relation to the nature, purposes and scope of the inquiry." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 209 (1946). Here, the court determined (Pet. App. 19a) that "the subpoena [was] highly specific in its description of the documents" OSHA sought, particularly with respect to the relevant time frames and affected areas of petitioner's facility. Although petitioner experienced some "burden" in complying with the subpoena, that

[6] As the court of appeals observed (Pet. App. 13a), this is not a case in which OSHA conducted a wall-to-wall inspection in response to a specific employee complaint. Rather, "presented with a complaint about welding, [OSHA] attempted to determine the adequacy of [petitioner's] welding procedures." *Ibid.*; cf. *Trinity Indus.*, 904 F.2d at 873.

burden was commensurate with the gravity of the risk involved. *Id.* at 18a-19a. Petitioner's vague protestations (Pet. 10, 15) concerning the privacy of its records fall far short of a basis for challenging those fact-bound conclusions by the court of appeals. See *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991) ("the burden of showing unreasonableness must be on the recipient [of the subpoena] who seeks to avoid compliance").[7]

Finally, the court below correctly concluded (Pet. App. 16a) that the subpoena at issue "easily satisfie[d]" the Fourth Amendment's relevance requirement. It is well established that "[t]he evidence sought by the subpoena * * * [must] not [be] plainly incompetent or irrelevant to *any* lawful purpose of the Secretary" under the authorizing statute. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (emphasis added);[8] see *R. Enters.*, 498 U.S. at 301 ("where * * * a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless * * * there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the * * * investigation"). Here, the 17 categories of documents all related to petitioner's "welding practices

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[7] The court also determined (Pet. App. 18a-19a) that OSHA's specification of the documents requested satisfied its obligation to impose no more than a "minimum burden" on petitioner under Section 8(d) of the Act. Petitioner does not allege any defect in that holding.

[8] The lower courts have uniformly adhered to this standard of relevance. See, *e.g.*, *National Eng'g & Contracting Co.*, 13 F.3d at 98-99; *Trinity Indus.*, 904 F.2d at 872; *EEOC* v. *Children's Hosp. Medical Ctr.*, 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc); *EEOC* v. *A.E. Staley Mfg. Co.*, 711 F.2d 780, 783 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984); *SEC* v. *Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir.), cert. denied, 449 U.S. 955 (1980).

and the danger of toxic gas leaks." Pet. App. 16a. Petitioner's contentions (Pet. 8-9) notwithstanding, OSHA was authorized to investigate petitioner's chemical containment system under Section 8(f), and the documents sought undeniably were relevant to that investigation. Cf. *National Eng'g & Contracting*, 13 F.3d at 99 n.6. "The very purpose of [an administrative] subpoena * * * is to discover and procure evidence, not to prove a pending charge or complaint," *Oklahoma Press*, 327 U.S. at 201, and a subpoena may issue "merely on suspicion that the law is being violated," or simply because the agency "wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-643.

2. Petitioner's contention (Pet. 8-9) that the decision below conflicts with the test of relevance articulated in *Donovan* v. *Fall River Foundry Co.*, 712 F.2d 1103 (7th Cir. 1983), and *Marshall* v. *W & W Steel Co.*, 604 F.2d 1322 (10th Cir. 1979), ignores the distinct standards for search warrants and administrative subpoenas.

In *Oklahoma Press*, this Court emphasized that an agency's request for documents pursuant to subpoena does not involve an "actual search and seizure," but only a " 'constructive' search." 327 U.S. at 202. For that reason, administrative subpoenas are not subject to the Fourth Amendment's Warrant Clause and the related requirement of probable cause. *Id.* at 208-209; accord *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *Morton Salt*, 338 U.S. at 652. The Court reaffirmed this distinction in *Lone Steer*, observing that while an administrative search must proceed in accordance with a warrant that meets probable cause (citing *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978)), "the enforceability of [an] administrative subpoena * * * is governed * * * by our decision in *Oklahoma Press*." 464 U.S. at 414.

Those holdings are based on the fundamental differences between a search warrant and an administrative subpoena. Unlike a search warrant, the subpoena provides the agency with no authority whatsoever to "enter petitioner's premises * * * to search them, or to seize or examine their books, records or papers." *Lone Steer*, 464 U.S. at 414; see *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1133 (7th Cir. 1988). Rather, the subpoenaed company itself, and not the agency investigator, reviews its files to find the documents specified in the subpoena. Nothing is exposed to the agency's view other than relevant documents. Thus, petitioner's repeated claim (Pet. 14, 16) that the decision below will permit OSHA to "rummage" or "search" through its files simply misdescribes the order at issue. Moreover, unlike a search warrant, the reasonableness of the subpoena may be challenged in district court prior to production, as petitioner did here. *Lone Steer*, 464 U.S. at 414-415.

The cases invoked by the petitioner, *Fall River* and *W & W Steel*, involved search warrants, not subpoenas. Applying the requirements of probable cause, the Seventh Circuit in *Fall River* reasoned that because there was no evidence "that the deleterious conditions [alleged in the employee complaint] may also be present in other portions of the facility," 712 F.2d at 1108, "[t]he Secretary has an obligation to limit * * * [the agency's] inspection of documents to those that bear some clear relevance to the conditions about which complaints have been received." *Id.* at 1111. Neither

Fall River nor *W & W Steel*[9] conflicts with the decision below because they involved the "limitations on records sought under a warrant following an employee's complaint, but did not address * * * the proper scope of employee records that may be subpoenaed in an investigation triggered by an employee complaint." *Trinity Indus.*, 904 F.2d at 873.[10]

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[9] The holding of *W & W Steel* is not as clear as petitioner's passing references (Pet. 6, 9) would suggest. In that case, the Tenth Circuit merely opined that a search warrant requesting documents "directly related to the purpose of the inspection" was not "overly broad." 604 F.2d at 1327. The court did not purport to define the permissible scope of a request for documents.

[10] In its decision in *In re Establishment Inspection of Skil Corp.*, 846 F.2d at 1133, which was rendered after *Fall River*, the Seventh Circuit specifically recognized the distinction between a subpoena duces tecum and a search warrant. In any event, the subpoena issued here satisfies the *Fall River* test. The "conditions about which" OSHA had received a complaint, 712 F.2d at 1111, were petitioner's welding practices, and the agency requested documents related to petitioner's "welding practices and the danger of toxic gas leaks" caused thereby. Pet. App. 16a. Those documents therefore bore "some clear relevance" to the complaint. 712 F.2d at 1111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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